JUL 21 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1961

No. 163

JOSEPH MOOK, LEONARD MOOK, SYLVIA MOOK, DAVID MOOK, DANIEL MOOK, and JOSEPH MOOK and LEONARD MOOK as Executors of the Estate of Morris Mook, Deceased,

Petitioners,

v.

SAMUEL S. BERGER, SADIE BERGER, HARRY MERDINGER, MILDRED MERDINGER, ARTHUR MERDINGER, HARVEY L. OSTROVER, LILA P. OSTROVER and THE AMERICAN FABRICS COMPANY,

Respondents.

PETITIONERS' REPLY BRIEF

JAY LEO ROTHSCHILD
Attorney and Counsel for Petitioners
10 East 40th Street
New York 16, New York

July 21, 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 163

JOSEPH MOOK, LEONARD MOOK, SYLVIA MOOK, DAVID MOOK, DANIEL MOOK and JOSEPH MOOK and LEONARD MOOK as Executors of the Estate of Morris Mook, Deceased,

Petitioners,

v.

SAMUEL S. BERGER, SADIE BERGER, HARRY MERDINGER, MILDRED MERDINGER, ARTHUR MERDINGER, HARVEY L. OSTROVER, LILA P. OSTROVER and THE AMERICAN FABRICS COMPANY,

Respondents.

PETITIONERS' REPLY BRIEF*

Our objective, in this Reply Brief, is to restore a correct perspective, in view of Respondents' calculated effort, in their brief, to avoid rather than meet the constitutional questions, which we raise. A striking example of that technique on the part of Respondents is their statement that "The Federal question relied upon by Petitioners was not properly raised before the Courts below.", in support of which astounding assertion Respondents state that "No constitutional question whatever was raised by

* Italics, unless otherwise indicated, have been supplied. As contemplated by this Court's Rule 39(3)—since this brief is less than ten pages, and since, in any event, there are no references contemplated by said rule—subject index and table of cases has been omitted.

Petitioners in the *underlying* action * * *" (Respondents' Brief, p. 23).

Of course, the issues in the injunction action sought to be reviewed, arise out of the underlying action, but the violation of constitutional rights, which we urge, is by reason of the injunction judgment sought to be reviewed. In the injunction action, the federal grounds are set out with such particularity and so clearly, that any statement such as made by Respondents cannot possibly pass the test of a mere reading of the answer in the injunction action (Appendix to Petition, pp. 72-74). So, for instance, the following from the first Defense, pleaded in Petitioners' answer in the injunction action:

> "18. Under the foregoing circumstances, the issuance of any restraint against defendants herein, would violate Article V and Article XIV (Section 1) of the Amendments to the Constitution of the United States, in that it would deprive defendants of the equal protection of the laws, and of their property without due process of law." (Appendix to Petition, p. 73),

and the following from the second Defense pleaded in Petitioners' said answer:

> "20. The New York judgment described in the complaint, insofar as it granted the individual plaintiffs herein judgment on their counterclaim, is not entitled to full faith and credit in the State of Connecticut or by its courts, because it purports, without any necessity or justification therefor, to declare what shall be the public policy of the State of Connecticut, and, in doing so, fails to enforce, honor, or give full faith and credit to Connecticut's public acts and statutory law, which plainly and unmistakably authorize a quorum of a Board of Directors of a corporation chartered by Connecticut, of 'more or less' 'than a majority', and authorize any such corporation to adopt by-laws requiring a vote of said quorum greater than a majority of said quorum." (Appendix to Petition, pp. 73-74).

Where the issue is whether action shall be restrained, of course, the inquiry must be as to the supposed justification

therefor, and decision must necessarily rest, as here, upon the effect of the injunction. Thus, the constitutional questions are squarely raised, in the case at bar, as to the invalidity of the injunction which the court was asked to and did issue—a fact which is recognized in the memorandum of the reporter of the Court of Appeals' decision in the injunction action (Appendix to Petition, p. 56; see, also, affidavit of Rothschild, p. 86).

No issue is raised on this petition, as to the *underlying action*, and the abstract declaration therein made. We take that as we find it. It is the injunction, which closes the doors to the Connecticut courts, so that they are deprived of choice as to whether *they* will enforce or refuse to enforce New York's declaration, which constitutes Petitioners' grievance!

The letter of the Clerk of the Court of Appeals, addressed to Respondents' attorneys (copy of which is annexed to Respondents' brief) is a duplicate original of the same letter which was also addressed to us. It does not support Respondents' contention that we did not urge the Constitutional questions we now raise. Reference to the memorandum will show that it merely recites the arguments which were made by both sides—not those upon which the Court of Appeals rested its decision. It is, of course, a truism that whatever arguments may be made to an appellate court, it does not follow, in the absence of an opinion, that any particular argument was adopted as the basis of its decision. What the letter of the Clerk does show is that whatever was decided as to Connecticut public policy, it was the *New York Court of Appeals* which decided all issues, and excluded the Connecticut court from deciding Connecticut's own law and public policy, applicable to its own corporation. And it is that very transgression by the New York Court of Appeals upon the prerogatives of the Connecticut court—in violation of Constitutional limitations—of which we complain. Such is the only issue which should have been the subject of Respondents' answering brief—and was not.

We have not reargued merely State questions, nor indulged, as Respondents put it (their Brief, p. 7), in "repeating and rehashing" non-federal questions, which, in this Court, are immaterial. On the contrary, we have limited ourselves to federal grounds only—all of which, of course, were raised below—and had to be.

By way of illustration of the generalizations thus far made, the following will suffice:

We did not argue any question of *res adjudicata*. Yet, Respondents argue that the underlying judgment was *res adjudicata*, notwithstanding that it cannot be denied that a declaratory judgment—without consequential relief—such as was rendered in the underlying action, concludes only what was actually litigated—not what might have been litigated (cf. footnote, Petition, p. 7)—and notwithstanding the further undeniable fact that any issue as to quorum not only was not litigated in the underlying action, but was never even pleaded or mentioned. Nor shall we permit ourselves to be diverted into a discussion of *res adjudicata*, and thus (though Respondents' analysis of the *res adjudicata* authorities is quite erroneous) contribute to irrelevancy, which Respondents seek to introduce. For the issue here is not as to what is the correct answer with respect to *res adjudicata*, but as to whether it is New York or Connecticut which should promulgate that answer. It is elementary that Connecticut can and should do that for itself.

Nor, for the same reason, is it important to resolve Respondents' quibble as to whether the New York injunction sought to be reviewed, had the effect, as we put it, "to enforce the underlying New York action", or, as Respondents put it, "to forestall an attempt at its nullification". Whatever the semantics, the question is still only as to whether it is New York or Connecticut which should be the final *continuing* authority as to the internal government of a Connecticut corporation. New York's injunction not only decided what was Connecticut's law for the gov-

ernment of a Connecticut corporation, as at the time of the controversy then before the New York court, but *by its injunction*, projected its own views into the future, so that a Connecticut corporation becomes the subject of New York's government for the entire time of its perpetual existence as a Connecticut corporation, notwithstanding what Connecticut might and did consider to be its own public policy, or what Connecticut thinks and may hereafter think to be its own public policy as to its own corporations, under ever liberalized laws, which, as we have seen, it has enacted, and which by Connecticut's command, are retroactive.

Put succinctly, the question is as to whether New York, by injunction, may, in reality, prevent Connecticut from governing its own corporation, now, and forever more.

Nor did we contend that a declaratory judgment, to be effective, must grant consequential relief. What we said was that government of its own corporation cannot be wrested from Connecticut by the procedural error of litigants, in applying to the wrong forum, and that New York may not enforce its own views for the government of a Connecticut corporation in a two-step procedure, any more than it could by a one-step procedure, i.e., it could not, in the underlying action, command obedience to its own declaration of Connecticut public policy, and enforce that obedience in Connecticut; and by that same standard, it may not, first, in one action, declare an abstract principle, and, in a succeeding action for injunction (which is the subject of this Petition), *by injunction* compel the enforcement of that abstract principle and thereby prevent the parties from thereafter invoking the jurisdiction of the Connecticut courts, to administer a Connecticut's corporation's internal government, if not as of the past, at any rate, now and for the future.

Put in other words, it was and is our point that the injunction represents the administration, by New York, of

consequential relief, i.e., actual enforcement of what was theretofore New York's abstract adjudication, and that such enforcement by New York, projected into Connecticut, violates the Constitutional principles upon which we rely.

Accordingly, the ultimate question is whether New York, even as to its own citizens, may enjoin application to a Connecticut court, by parties—including the *Connecticut corporation* itself—for the formulation of Connecticut's continuing public policy as to the internal government of its own corporation. We argue that, under the provisions of the Constitution of the United States, upon which we rely, the answer should be that New York may not so invade Connecticut's exclusive prerogative; that the public issue of interstate mutual respect is bigger and more important than that of the outcome of the underlying private controversy between litigant stockholders (AFC not being a party to that litigation); that the issue here is not as to the effect of a waiver by adverse parties to a private litigation, of what, as between them, should in any event, have no greater effect than reflected by the *abstract* declaration made in the underlying litigation, but as to the effect of such waiver, now and in the future, on the public interest, reflected in Connecticut's right to formulate its own public policy, and the effect upon the efficient and healthy operation of the federal system. Otherwise, by accommodation, individuals may always cooperate so that New York may govern Connecticut corporations, and Connecticut may govern New York corporations, and so with respect to each of the other States of the Union, which may thus find their corporate creatures externally controlled by foreign governments.

An unthinkable result!

Such is the basic issue: It is for Connecticut to decide its own public policy; not for New York to project its conceptions of what should be Connecticut's public policy, now and in the future, and to enforce those conceptions by enjoining its citizens, who are stockholders of a Con-

necticut corporation, from invoking the Connecticut courts to express Connecticut's public policy as to the government of its own corporation.

Our federal system depends upon recognition of the fact that there should be rendered unto Caesar the things which are Caesar's! So this Court has held, in exercising its supervisory federal jurisdiction.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals of the State of New York.

Dated, July 21, 1961.

Respectfully submitted,

JAY LEO ROTHSCHILD,
Attorney and Counsel for Petitioners.